T. JACK FOSTER TRUST A

IBLA 87-324 Decided November 8, 1989

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying application for disclaimer of mineral interest. Guthrie 014447.

Affirmed as modified.

1. Patents of Public Lands: Effect--Federal Land Policy and Management Act of 1976: Disclaimers of Interest

A decision rejecting application for a recordable dis- claimer of mineral interest will be affirmed on appeal where the record shows that more than 12 years have elapsed between the time the owner-applicant knew or should have known of the alleged claim attributed to the United States and the date application for disclaimer was made to the Department. 43 CFR 1864.1-3.

APPEARANCES: T. Jack Foster, Jr., Trustee, for appellant; Gayle E. Manges, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

T. Jack Foster, trustee of T. Jack Foster Trust A, appeals from a February 13, 1987, decision of the New Mexico State Office, Bureau of Land Management (BLM), denying his application for recordable disclaimer of mineral interest in patent No. Guthrie 014447. The application for disclaimer was filed with BLM on November 9, 1981. Appellant is allegedly the successor in title to oil and gas interests acquired on November 17, 1959, from the patentee, Ephriam J. Berends, or his successor. Departmen- tal records establish that the patent for the land for which disclaimer is sought was obtained pursuant to the provisions of the Stock-Raising Home- stead Act of 1916, 43 U.S.C. §§ 291-301 (1976), which required that all mineral rights be reserved to the United States in patents issued under the Act. See 43 U.S.C. § 291 (1976).

It is unchallenged that on February 18, 1924, application Receipt No. 2720863 for Additional Homestead Entry No. 014447 was filed by Ephriam J. Berends under the Act of April 28, 1904 (33 Stat. 527), at

the Land Office, Guthrie, Oklahoma. The entry was an additional entry to Homestead Entry No. 09555 made September 20, 1916, for the N\ NE^ of sec. 14 and the N\ NW^ of sec. 14, T. 6 N., R. 27 E., Cimarron Meridian. On March 6, 1924, another application, also Receipt No. 2720863, Stock- Raising Homestead Entry - Additional No. 014447, was received in the Guthrie Land Office. The second additional entry was filed "under the Act of December 29, 1916, (Public No. 290, 64th Congress)," and was sub- ject to the reservation to the United States of all coal and other minerals.

The entered land in the second additional entry is described the same as in the first additional entry as "Lot 1 Sec. 12. T. 6 R. 27, Lot 1, Sec. 7 and Lot 4 of Section 8, Township 6 North of Range 28 E.C.M." This entry for the additional stock-raising homestead was stated to be additional to Homestead Entry No. 022170 made February 12, 1912, for land described as the N\ NW^ of sec. 13 and the N\ NE^ of sec. 14, T. 6 N., R. 27 E., Cimarron Meridian. The land described in sec. 13 differs from the first additional entry, which describes the N\ NW^ as being in sec. 14. Therefore, two additional homestead entries were made by Ephriam J. Berends under two Acts of Congress, one the Homestead Act of April 28, 1904, and the other the Stock-Raising Homestead Act of December 29, 1916.

By decision dated May 5, 1925, "Addl Stock-raising Hd. Appn, Serial No. 014447, Receipt No. 2720863," for lot 1, sec. 12, T. 6 N., R. 27 E.; lot 1, sec. 7; and lot 4, sec. 8, T. 6 N., R. 28 E., Cimarron Meridian, containing 52.47 acres was allowed by the Register of the Guthrie Land Office. On June 11, 1929, notice of the application to make final proof for "Add Stock-Raising Homestead Application Serial Receipt No. 2720863 No. 014447" for the land was filed by Berends with the U.S. Commissioner of the Land Office. On July 31, 1929, the Commissioner of the General Land Office required submission of final proof by Berends for the additional entry under the Stock-Raising Homestead Act. The entry is referred to as "Guthrie 014447 'C' WWC." Final proof dated September 28, 1929, relating to the first additional entry, was filed by Berends identifying the entryman as the one making Additional Homestead Entry No. 014447 on February 18, 1924. The proof recites that no house or residence was found on the additional tract which was used for "grazing my stock." The final proof filed by Berends contains answers to questions relating only to additional entries made under the 1916 Stock-Raising Homestead Act. The testimony of witness James Shaffer recites that the land was claimed as "a Stock-Grazing entry."

After publication referring to "additional stock raising homestead entry No. Guthrie 014447," a Final Certificate Homestead approved October 31, 1929, issued to Ephriam J. Berends for Guthrie 014447. The certificate is stamped that it is "as provided for by Act of Dec. 29, 1916 (39 Stat., 862)" and "Stock-Raising Hds. Act Dec. 29, 1916 (39 Stat., 862)."

Appellant has furnished what purports to be an exact copy of original patent No. Guthrie 01447, recorded March 3, 1930, in Book 59 of patents

at 380, Beaver County, Oklahoma. The date of issuance of the patent shown is November 18, 1929. No reference is made in this document to a reservation of minerals nor to the 1916 Stock-Raising Homestead Act.

The record also contains a copy of what appears to be an exact copy of original patent Guthrie 014447, recorded February 15, 1968, at Book 320, page 496, Beaver County, Oklahoma. This document reveals identical signatures, date of patent issuance, and describes the same land as the document recorded in 1930. The 1968 recording, however, contains a reservation of "all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862)."

BLM's lands records show that the coal and other minerals were reserved to the United States by the patent issued to Berends. Federal oil and gas leases GLO 06112 and BLM 09740 issued on December 31, 1938, and April 1, 1947, respectively, for oil and gas deposits on the subject property.

Relying on United States v. Price, 111 F.2d 206 (10th Cir. 1940), appellant demands a disclaimer by the United States of any mineral interest in the property. BLM relies on the second patent recorded in 1968 to support rejection of the disclaimer application. Admitting that it cannot explain why the patent recorded on March 3, 1930, failed to include either a reservation of coal and other minerals or a reference to the Stock-Raising Homestead Act of December 29, 1916, BLM contends such failure cannot divest the United States of the mineral estate.

BLM distinguishes the Price decision from the instant appeal because the

> facts in this request for disclaimer differ * * * in that the entry leading to Berends' patent was the second additional entry by Berends and was specifically under the Stock-Raising Homestead Act. This was the only entry allowed. The Final Proof was for the Stock-Raising Homestead Entry and it was allowed and the Final Certificate described the Stock-Raising Homestead entry, not the first additional entry under the general homestead act.

(Answer at 5-6).

In United States v. Price, supra, the final certificate issued subject to a reservation of minerals as provided in the Stock-Raising Homestead Act, however, "the patent issued inadvertently failed to contain such reservation and also failed to make reference to the act under which said minerals were reserved" (111 F.2d at 206). As it does here, the Government in Price urged "that the application to make the entry, the final certificate, and other data in the General Land Office showing that the entryman had exhausted all of his homestead rights except under the stockraising homestead act, all disclose an intention to proceed and acquire title under that act" (Id. at 207).

Except for the duplicate and inconsistent recordings appearing in the instant case, the cases are indistinguishable. The Tenth Circuit concluded in Price that:

> [O]fficers of the land department are required in the course of their duties to determine many preliminary questions leading up to the issue of patents conveying public lands. These include the qualifications of the applicant, the acts performed in respect to residence, cultivation, and improvements, the nature of the land, and whether it is of the class which is subject to entry. And when acting within the scope of their jurisdiction, the determination made by such officers of questions of fact is conclusive in a judicial proceeding in which the patent is collaterally questioned. A patent, regular on its face and issued in a case in which the land department has jurisdiction constitutes an implied finding of every fact which is made a prerequisite to its issue; and upon collateral attack, a court cannot go behind it and look to the antecedent proceedings on which it is founded. [Citations omitted.]

Id. at 208.

The Tenth Circuit refused to look behind the patent which contained no mineral reservation. As was also the case in Price, BLM has not here alleged that patent No. 1032388, recorded on March 3, 1930, is irregular on its face. (See Phelps Dodge v. State of Arizona, 548 F.2d 1383, 1386 (9th Cir. 1977) where a deed irregular "on its face" permitted examination of the "antecedent proceedings on which it is founded.") While we might, therefore, be inclined to follow Price, we must affirm BLM's rejection of appellant's application for a recordable disclaimer on other grounds.

Subpart 1864 of 43 CFR contains regulations governing the Department's authority to issue recordable disclaimers of interests in lands. Section 1864.1 governs application for issuance of a document of disclaimer, and provides, pertinently: "(a) An application shall be denied by the authorized officer if: (1) More than 12 years have elapsed since the owner knew or should have known of the alleged claim attributed to the United States." 43 CFR 1864.1-3.

The regulation was applied in somewhat similar circumstances in Robert R. Perry, 87 IBLA 380 (1985). Therein we stated:

> This Board admits to considerable perplexity concerning the purpose of the regulation, which would compel denial of appellant's application even if the Government freely acknowledged that it had no interest in the land and that he was the undisputed owner. If the United States has wrongly contended that it is the owner of the land for more than 12 years, the regulation inexplicably bars the very relief that the statute was intended to afford.

Id. at 388.

As we observed in Perry, Departmental regulations have the force and effect of law and are binding on the Department and the Board of Land Appeals. Robert R. Perry, supra at 388; Sam P. Jones, 71 IBLA 42 (1983). The existence of two mineral leases issued by the United States on December 31, 1938, and April 1, 1947, respectively, embracing the minerals in the subject property constituted "an alleged claim attributed to the United States" of which "the owner knew or should have known of." Appel-lant as a subsequent purchaser was charged with constructive notice of the existence of the leases when the mineral interest was allegedly acquired in 1959 (Application for Disclaimer at 1) pursuant to the applicable New Mexico recording statute. See N.M. Stat. Ann. § 14-9-2 (1978); Romero v. Sanchez, 492 P.2d 140, 143-44 (N.M. 1971). Moreover, the 1968 recording of the patent which contained the mineral reservation to the United States gave further notice of the fact that the United States continued to claim the mineral estate in this land. The 12-year period established by 43 CFR 1864.1-3 had long since expired when appellant filed his application for disclaimer on November 9, 1981. This Departmental regulation, therefore, requires denial of the application for disclaimer regardless of the merits of appellant's claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Franklin D. Arness
Administrative Judge

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CHIEF ADMINISTRATIVE JUDGE HORTON CONCURRING:

I concur in the result in this case, but as a procedural matter I believe grounds may exist for dismissing this appeal for failure to file a statement of reasons.

Appellant's application for disclaimer of mineral interest, filed in October 1981, was denied by BLM by decision dated February 13, 1987. By a one-page letter dated March 6, 1987, denominated as the "Notice of Appeal and the Statement of Reasons," appellant submitted three enclosures, adding: "These enclosures are all that we intend to submit and we believe that the appeal can be judged on the record." The enclosures consist of the following: (1) A copy of the decision appealed from; (2) A copy of appellant's application for disclaimer; and (3) A copy of a "Legal opinion from Richard K. Goodwin & Associates of Oklahoma City dated October 16, 1981, a copy of which was attached to my letter of demand."

The only enclosure above that arguably might qualify as a document in support of the appeal is item 3. Leaving aside the question of whether mere enclosures or attachments to a notice of appeal may suffice as a statement of reasons, the difficulty with item 3 is obvious: it is a document that accompanied appellant's application at issue, which BLM subsequently denied, and it therefore is not a statement in response to the decision which affirmatively points out error in the decision. See United States v. Fletcher De Fisher, 92 IBLA 226 (1986); Andre C. Capella, 94 IBLA 181 (1986); Don G. Carpenter, 94 IBLA 7 (1986). See also Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (1989).

In my view, it would be within the Board's discretion to dismiss this appeal under authority of 43 CFR 4.402 for failure to file a statement of reasons.

Wm. Philip Horton
Chief Administrative Judge